Taurus Waste Disposal, Inc. *and* Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-8501

August 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 5, 1982, Administrative Law Judge Steven Davis issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

AMENDED REMEDY

We adopt the Administrative Law Judge's recommended remedy requiring Respondent to make the employees whole by paying all insurance fund, severance fund, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and to continue such payments until such time as Respondent negotiates in good faith with the Union to a new agreement or to an impasse. However, we note that he failed to provide for the possibility of interest or to take into account the potential extent of a "make-whole" remedy concerning an employer's failure to contribute to benefit funds. Thus, because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments, or other losses attributed to such conduct. Instead, it leaves to the compliance stage the question of whether a respondent must pay any additional amounts into benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return of investment of the portions of funds withheld, additional administrative costs, etc., but not collateral losses. *Merriweather Optical Company*, 240 NLRB 1213 (1979). We modify the remedy and the recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Taurus Waste Disposal, Inc., Sayville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(b):

"(b) Make its employees whole by paying all insurance, severance, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent Respondent's unlawful discontinuance of such payments, and continue such payments, in the manner described in the section of the Board's Decision and Order entitled 'Amended Remedy,' until such time as Respondent negotiates in good faith a new agreement or to an impasse."

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: This case was heard before me at Brooklyn, New York, on August 10 and November 5, 1981.

On December 10, 1980, Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, filed a charge in Case 29-CA-8501 based upon which[1] a complaint was issued on January 19, 1981, alleging violations of Section 8(a)(1) and (5) of the Act. Specifically, the complaint alleges that Taurus Waste Disposal, Inc., herein called Respondent, violated Section 8(a)(1) and (5) of the Act by (a)

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[1] The charge also alleged the discharge of William Larberg. That part of the charge alleging the discharge was withdrawn before the hearing and is not before me for decision.

failing and refusing, since on or about August 6, 1980, to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees; (b) withdrawing benefits from its employees on or about September 1, 1980, by ceasing to make payments on behalf of the unit employees into contractual fringe benefit funds since the expiration of the collective-bargaining agreement on August 31, 1980; and (c) withdrawing, on or about December 8, 1980, its recognition of the Union as the exclusive collective-bargaining representative of the employees.

Briefs have been filed by all parties and have been duly considered. Based upon the entire record,[2] the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its principal office and place of business at 38 Easy Street, Sayville, New York, is engaged in the business of the removal of rubbish, cinders, ashes, waste materials, building debris, and similar products within Suffolk County, New York. It annually derives gross revenues in excess of $500,000 from its business operations and also annually purchases and receives goods and materials valued in excess of $50,000 which are delivered directly to its facility from other States. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent and the Union have been parties to collective-bargaining contracts since 1975. The original recognition of the Union by Respondent in 1975 was based upon a card showing by the Union. At that time Respondent did not negotiate the terms of the contract but rather accepted and signed a contract containing the same terms and conditions as that negotiated by an employer association known as the Corrigan group.[3] Respondent had not been and is not a member of that employer association. Respondent's contractual relationship with the Union had, therefore, always been upon an individual basis. The first contract between Respondent and the Union was effective from March 17, 1975, to August 31, 1977.

There was apparently much bitterness between the parties, historically. Thus, at the expiration of the first contract in August 1977 the then president of Respondent, John (Jack) Montesano,[4] along with other employers formed an independent employer association[5] and an independent union in an attempt to avoid continuing to deal with the Union.[6] Apparently nothing came of those organizations since Respondent signed a renewal collective-bargaining contract which was effective from September 3, 1977, to August 31, 1980. Again, as to this contract, as had occurred with respect to the first contract, Respondent did not negotiate the terms of the contract with the Union but rather accepted and signed a contract containing the same terms and conditions as that negotiated by the Corrigan group.

In the period 1975 through 1979, apparently Respondent was not reporting the names of all of its employees to the Union and not making proper contributions to the union funds according to their contract. The Union accordingly filed for arbitration claiming that it was owed $40,000. The matter was settled, sometime in 1974, for $23,000.[7]

B. *The Events Surrounding the Expiration of the Contract on August 31, 1980*

On June 10, 1980,[8] the Union sent a certified letter to Respondent, advising it, *inter alia*, that the Union wished to amend and modify the terms of the contract which was to expire on August 31. The Union further advised that its proposals for a new contract would be sent to Respondent at a later date.

On June 17, the Union sent a letter to Respondent by regular mail, which contained the Union's proposals for a renewal contract with a request that Respondent contact the Union to arrange an appointment to negotiate the renewal agreement. The Union received no response to this letter.

On June 26, the Union's letter of June 10 was returned to it marked "unclaimed." The following day, on June 27, the Union sent copies of its June 10 letter and proposals to Respondent. That letter was not returned to the Union and the Union received no response to it.

On July 30, the Union sent a letter to Respondent and other employers who deal on an individual basis with the Union, advising them of a meeting to be held in the Union's New York City office on August 12 for the purpose of negotiating the terms of the renewal contract.

On August 6, Jack Montesano sent a letter to the Union advising it that he was unable to attend the August 12 meeting because he had to appear in traffic court and requesting that the meeting be held on Long Island. He added that he had not received the Union's demands for the new contract.

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[2] C.P. Exhs. 1 and 2, received in evidence at the hearing, were apparently lost thereafter, and copies thereof could not be obtained. All parties have agreed that I not consider those exhibits in the determination of this case, and I have not considered them.

[3] Corrigan is the name of the man who represents the employer association. The Corrigan group consists of about 80 to 90 employers.

[4] There are two persons named John P. Montesano in this Decision. The father, known as Jack, will be referred to as Jack Montesano, and the son will be referred to as John Montesano.

[5] The association was known as the Suffolk County Solid Waste Institute. The Union was known as the Brotherhood of Cartmen and Haulers Union of North America.

[6] This information is according to the uncontradicted testimony of Union Representative Bernard Adelstein.

[7] This according to the uncontradicted testimony of Union Representative Bernard Adelstein.

[8] All dates hereafter are in 1980 unless otherwise stated.

On August 8, the Union replied, offering Respondent August 13 at the Union's office as a date for the meeting. The Union also enclosed a copy of its proposals. The Union received no response to its letter, and apparently Respondent did not attend the meetings on August 12 or 13.

Union business agent Michael Fleischer visited Respondent on August 11 to discuss the discharge of an employee. Fleischer asked Jack Montesano if the Union is "going to have a rough time with the contract with you again this time around as well as last time." Jack Montesano replied that there would be no problems.[9]

In or about July or August, negotiations began between the Union and the Corrigan group. On August 31, the contract expired.

Respondent and the Union stipulated that, on or about September 1, Respondent ceased making payments on behalf of its drivers and helpers into the insurance, severance, and pension funds that were provided for in its contract which expired on August 31. It was also stipulated that Respondent created its own pension fund without consultation with the Union.

On September 1, the Union struck because of the Corrigan group's refusal to grant retroactivity of the contract's terms to September 1. All of the Union's members were told to strike, including those employed by Respondent. On September 4 the strike was settled and on or about September 15 the formal contract was signed by the Corrigan group. Copies of the contract were mailed to employers, including Respondent, which had contracts with the Union. The Union received no reply from Respondent to its mailed contract.

C. *The Attempt To Have Respondent Sign the Contract and the Charges Against the Union*

1. The meeting of October 13

Michael Fleischer, the Union's business agent, testified that on October 13 he and union representative Billy Harris visited Jack Montesano at Respondent's facility. Also present was Thomas Ronga, the owner of Detail Cargo, another garbage removal company. Fleischer testified that he gave Jack Montesano a copy of the contract and asked him if he was going to sign it. Jack Montesano replied: "Yes, I will sign it, I just want to look it over." He then asked Fleischer to return in 3 days to pick it up. Fleischer then left.

John Montesano testified that Fleischer told Jack Montesano that Union Representative Bernard Adelstein wanted him to sign the contract. According to John, his father said: "To be honest with you fellows if you still got that hot cargo clause in there I am not going to sign it, there are a lot of things I want to talk to you about." Jack Montesano also said that he had to give the contract to his attorney.

Fleischer was not asked specifically if John Montesano was present during that meeting. Neither Harris nor Ronga testified.

Fleischer phoned Jack Montesano on October 16, and asked him if he could pick up the contract. Jack Montesano replied that the contract was "okay" with him but he wanted his attorney to look at it before he signed it. Jack Montesano added that his attorney was then in Israel and would return on November 14. Fleischer reported this conversation to Adelstein.

2. The Union's action against Jet Sanitation

Shortly after Adelstein was told by Fleischer that Respondent claimed an inability to sign the contract due to its attorney's absence, union attorney Richard Weinmann told Adelstein that in fact Respondent's attorney, Reuben Kaufman, had not gone to Israel when it was alleged that he had. Adelstein then decided that, as a response to Respondent's misstatements or falsely stating the unavailability of counsel, he would investigate whether Respondent was a party to any violations of the terms of its recently expired contract with the Union.

Accordingly, Adelstein learned that Jet Sanitation Service Corp. was subcontracting work to Respondent in violation of the contract.[10] On October 31, Adelstein sent a letter to Jet so advising it, and also directing that it cease the violation immediately.[11]

Jet complied with the Union's request, and refused to permit Respondent to pick up work from it. For 2 to 3 weeks Respondent's trucks were not used at all.

In early November, union attorney Weinmann received a phone call from Respondent attorney Kaufman. Weinmann was asked by Kaufman to arrange a meeting regarding the work lost by Respondent from Jet Sanitation pursuant to the Union's demand for compliance with the subcontracting clause. Weinmann agreed to set up the meeting and asked Kaufman whether Respondent was ready to sign the contract. Kaufman replied that there were "a few little things" that would have to be "ironed out" first. A meeting was arranged for November 14.

On November 14, Kaufman called and canceled the meeting because he was in a doctor's office with his wife who was ill. Weinmann offered to meet later that evening. Kaufman declined saying that he could not leave his wife, but added that he was leaving for Israel on November 17, and would be returning on December 10. Weinmann then offered to meet on November 16 or 17. Kaufman again refused, saying that he could not leave his wife. Weinmann then said that he would not wait for Kaufman's return from Israel on December 10 and he would do whatever was necessary to protect the Union.

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[9] This according to the uncontradicted testimony of Fleischer. Jack Montesano died on April 13, 1981, and thus did not testify at the hearing.

[10] The subcontracting clause of the contract, which was later the subject of a charge against the Union, to be discussed *infra*, states:

> SUB-CONTRACTING
>
> No work or services presently performed or hereafter assigned to employees in the collective bargaining unit will be sub-contracted, transferred, leased, assigned or conveyed in whole or in part to any other person, firm, partnership or corporation which is not a party to this Agreement.

[11] Apparently, the Union's theory was that Jet, which was a signatory to the union contract, had subcontracted work to Taurus which was not a party to the contract because it had not yet signed the 1980–83 agreement.

3. The meeting of November 17

Union agent Fleischer testified that on November 17 he again visited Respondent's premises. The same people were present then who were present at the October 13 meeting, with the addition of John Montesano, who entered the room in the middle of the conversation, but was not present for the material part of the conversation, according to Fleischer.

Fleischer testified that Jack Montesano said that he would not sign the contract, adding that he was going to decertify the Union. Ronga told Jack Montesano that he (Montesano) made a commitment to sign the contract.[12] Jack Montesano then told Fleischer that he did not like him, showed him a pistol in his desk drawer, told him that he would blow Fleischer's brains out, and ordered him out of his office. Fleischer then left.

John Montesano testified that he was present for half the meeting, during which Jack Montesano said: "This is why I didn't want to sign it to begin with. It proves the fact about the hot cargo clause, now I am out of work, he[13] took half my business." Fleischer replied: "All your problems will be over. All you got to do is sign. . . ." Jack Montesano then said: "I told you before. I am not signing with that clause in it. There is a lot of other things I want to talk to Bernie about." Jack Montesano also asked Fleischer: "Why are you trying to crucify me like Jesus Christ?" Ronga also asked Jack Montesano to sign the contract. Jack Montesano replied that he could not sign because the Union was trying to take his business from him. Fleischer asked: "Don't you think the benefits are good in the Union?" There was no reply. John Montesano, while admitting that his father owned a pistol, denied that he (Jack) threatened Fleischer or even kept the pistol in his office.

4. The charges against the Union

On November 19, Respondent filed an 8(e) charge[14] against the Union in which it alleged that, since October 31, the Union has entered into a contract or agreement with Jet Sanitation Service Corp. whereby Jet has ceased doing business with Respondent in violation of Section 8(e) of the Act.

On November 21, Weinmann phoned Jack Montesano and asked for a meeting for November 24, 25, or 26. Montesano agreed to meet on November 26 at the office of the commissioner of labor.

On November 25, Gloria Rosenblum, an associate of Kaufman, called Weinmann and told him that Montesano could not attend the meeting because he was serving on jury duty. Weinmann offered to meet in the evening, after jury duty was completed. Rosenblum agreed but said that she would have to check with Jack Montesano.

The following morning, November 26, Rosenblum called Weinmann and told him that Jack Montesano would not meet. Rosenblum asked Weinmann in either this conversation or the one on November 25 whether there was "any room to alter the contract." Weinmann replied that the contract had already been agreed to, but that, if there were some "minor problems" regarding it, the contract could be signed and the parties could then have a side letter agreement clarifying certain points.

5. The calls of November 28 and 30

Weinmann phoned Kaufman on November 28 and asked for a meeting regarding the contract. Kaufman replied that he would be seeing Montesano the following day. Weinman said that, although he and Bernard Adelstein were leaving for Puerto Rico that day, Union Representative Martin Adelstein would be available in New York to meet.

Weinmann testified that on November 30 he phoned Kaufman from Puerto Rico and asked him for the status of the matter. Kaufman replied that he and Jack Montesano would not be meeting with Martin Adelstein. Kaufman also asked whether there had ever been an election among Respondent's employees. Weinmann replied that he believed that the original recognition was based upon a card showing. Kaufman then said: "Well, we are going to file a petition." The conversation then ended. Weinmann testified that no counterproposals were ever offered by Respondent to the Union's demands or to the contract which had been tendered. Weinmann also denied that Kaufman or any agent of Respondent offered to accept the contract if the subcontracting clause or any other provision was altered or removed. Weinmann further stated that the issue of the subcontracting clause as it related to the proposed contract was never raised with him by Respondent prior to the instant hearing.

Kaufman testified regarding Weinmann's November 30 call. Kaufman stated that Weinmann asked that the 8(e) charge be withdrawn,[15] and also asked to negotiate the contract upon his return from Puerto Rico. Kaufman refused to withdraw the charge, and told Weinmann that Respondent would not sign the contract containing the subcontracting clause, and there would be no agreement unless the clause was removed. Kaufman did not recall asking Weinmann whether there had been an election among Respondent's employees, but significantly he admitted telling Weinmann on November 30 that "the employees had filed a petition for election."[16]

D. *Subsequent Events*

On December 1, the Union executed a settlement agreement in settlement of the 8(e) charge.[17]

On December 8, a decertification petition was filed by an employee of Respondent.

On December 10 the Union filed the instant charge.[18]

[12] This apparently refers to the October 13 meeting at which Jack Montesano said that he would sign the contract, but needed time to examine it.

[13] Apparently referring to Bernard Adelstein.

[14] Case 29-CE-53.

[15] Previously, on November 25, the Board agent sent withdrawal request forms to Respondent. They were not executed.

[16] As will be discussed, *infra*, a decertification petition was filed on December 8.

[17] By the terms of the settlement agreement, the Union agreed to notify all parties to the collective-bargaining agreements that the subcontracting clause is void and unenforceable, insofar as it prohibits subcontracting to anyone who "is not a party to the agreement."

[18] The petition was dismissed on May 15, 1981, subject to an application by the petitioner for reinstatement of the petition after the final disposition of the instant case (29-CA-8501).

E. *The Unit*

The unit description alleged in the complaint is as follows:

> All full-time and regular part-time drivers and drivers' helpers employed by the Respondent at its Sayville, New York facility, exclusive of all other employees, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Respondent's answer denied the above description but the unit issue was given no attention by the parties during the hearing. The subject was addressed by counsel for the General Counsel in her brief, but was not addressed by Respondent or the Union in their briefs. The two contracts honored by Respondent, which were effective from 1975 to 1977, and from 1977 to 1980, and the contract at issue herein, which runs from 1980 to 1983, describe the unit as "all chauffeurs and helpers at all locations of the Employer, except those employees not eligible for membership in the Union in accordance with the provisions of the Labor Management Relations Act of 1947, as amended. . . ." Accordingly, I find that the correct unit description is that alleged in the complaint, as set forth above. "Such unit is consistent with that recognized by the parties in their collective bargaining agreements and these agreements described the bargaining unit with sufficient clarity."[19]

III. ANALYSIS AND CONCLUSIONS

A. *The Alleged Refusal To Meet and Bargain With the Union; the Alleged Withdrawal of Recognition of the Union*

The General Counsel alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing, since on or about August 6, 1980, to meet and bargain with the Union. The General Counsel also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union on or about December 8, 1980.

Respondent raises certain affirmative defenses in its answer and at hearing essentially as follows: (1) The Union refused to negotiate with it.[20] (2) The Union refused to negotiate with Respondent until the Union negotiated a contract with the industry association, and thereafter attempted to coerce Respondent to execute the same contract without any negotiation. (3) The contract contained an illegal and void hot cargo clause which rendered the entire proposed contract illegal. (4) Respondent is excused from bargaining because a decertification petition had been filed by its employees.

The Board has long held that a collective-bargaining agreement, lawful on its face, raises an irrebutable presumption that the union's majority status continues through the end of the contract. This presumption continues beyond the expiration of the contract, but becomes rebuttable. The burden of rebutting this presumption is upon the party that would do so.[21] The question then is whether the respondent has rebutted the presumption that the union represents a majority of the employees in the unit in question. In defending its refusal to bargain with the union, it is incumbent upon the respondent to demonstrate either that the union did not enjoy majority support at the time of the refusal to bargain or that it has reasonable doubts based on objective considerations for believing that the union had lost its majority status when it refused to bargain. As noted, such presumption continues following the expiration date of the contract. Moreover, before refusing to bargain, it was incumbent upon Respondent herein to rebut that presumption either by showing (1) that at the time of the refusal the Union no longer enjoyed majority representative status, or (2) that its refusal was predicated on a good-faith and reasonably grounded doubt of the Union's continued majority status.[22] Respondent has not met its burden.

The mere filing of a decertification petition does not destroy the presumption of continued majority status that a recognized union enjoys.[23] No other evidence was adduced concerning the Union's alleged lack of majority support or of Respondent's reasonable doubts based upon objective considerations for believing that the Union had lost its majority status. Moreover, I note that the decertification petition was filed on December 8, which was more than 3 months after Respondent's admitted cessation of its payments to the Union's contractual fringe benefit fund immediately upon the expiration of the contract on September 1, 1980.[24]

Respondent alleges that the contract is not lawful on its face because of the existence of the alleged unlawful hot cargo subcontracting clause which thereby relieved it of its obligation to bargain. However, I find that Respondent never asserted this defense to the Union prior to the instant hearing.[25]

Moreover, the subcontracting clause in the contract[26] has not been determined to be unlawful.[27] This identical

> . . . provision was contained in two prior contracts immediately preceding the current collective-bargaining agreement. The Respondent not only signed but also honored each of these agreements without complaining about the illegality of this provision.[28]

It was only after Respondent filed a charge on November 19 alleging the unlawfulness of the clause that it sought to avoid its obligation to bargain with the Union

[19] *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 721, fn. 8 (1981); *Dial Tuxedos, Inc.*, 250 NLRB 476, 481 (1980).

[20] No charge alleging a refusal to bargain had been filed against the Union.

[21] *Henry Cauthorne, t/a Cauthorne Trucking, supra: Eastern Washington Distributing Company, Inc.*, 216 NLRB 1149 (1975).

[22] *Impressions, Inc.*, 221 NLRB 389, 403 (1975).

[23] *Lammert Industries, a division of Componetrol, Inc., a subsidiary of I-T-E Imperial Corporation*, 229 NLRB 895, 932 (1977), and cases cited therein.

[24] That issue will be discussed, *infra*.

[25] *Canterbury Gardens and Manchester Gardens, Inc.*, 238 NLRB 864, 865 (1978).

[26] The clause is set forth, *supra*.

[27] Respondent's charge alleging its unlawfulness was settled by the Union.

[28] *Central Plumbing Company*, 198 NLRB 925, 929-930 (1972).

by asserting the illegality of the subcontracting clause. These circumstances cause me to conclude that Respondent raised the issue of the allegedly unlawful subcontracting clause as an afterthought. As a result of the settlement of the case against the Union on December 1, the subcontracting clause of the contract has been modified, but nevertheless Respondent had not met with the Union to negotiate a contract prior to the instant hearing. Moreover, as the agreement contains a separability clause and the subcontracting provision is independent of other sections of the contract, the document as a whole is not rendered invalid by the alleged illegality of that clause.[29]

Accordingly, I find and conclude that the Union continued to represent a majority of the employees of Respondent upon and after the expiration of the contract on August 31, 1980.

Section 8(d) of the Act sets forth the bargaining obligation of the parties:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .

The test of good faith in collective bargaining is whether a party to negotiations conducted itself during the entire negotiations so as to promote rather than defeat an agreement.[30]

The evidence establishes, as set forth above, that the Union requested bargaining for a new contract on June 10, 17, and 27, and advised Respondent of its demands.[31] The Union repeatedly thereafter, in its letters of June 17, July 30, and August 8, offered to meet with Respondent for the purpose of negotiating a renewal agreement,[32] but received no reply except for a letter dated August 6 in which Respondent's president replied that he was unable to meet on August 12 due to a traffic court appearance. The Union immediately offered to meet on August 13, but Respondent did not respond to that offer.

Union agent Fleischer, whose testimony I credit,[33] stated that on October 13 Jack Montesano agreed to sign the contract which had been negotiated between the Corrigan group and the Union, but wanted 3 days to look it over. Three days later, on October 16, Jack Montesano told Fleischer that the contract was "okay" with him but that he wanted his attorney to look at it.

On only one occasion prior to the hearing, Respondent requested a meeting to discuss the contract. Thus, a meeting was arranged for November 14 but was then canceled due to the illness of the wife of Respondent's attorney. Union attorney Weinmann's repeated offers to meet thereafter were rejected by Respondent.

Respondent's attitude toward bargaining with the Union was illustrated by the November 17 meeting between Fleischer and Respondent. Jack Montesano refused to sign the contract, adding that he would "decertify" the Union.[34]

It is further observed that Respondent's president agreed to meet with the Union on November 26 but then canceled that meeting because he was scheduled to serve on jury duty that day. The Union's further offer to meet at the conclusion of jury duty was rejected by Respondent.

The Union further advised Respondent in late November that it was available to meet, but Respondent again rejected that offer.[35] The parties thereafter did not meet to negotiate a contract prior to the hearing.[36]

Respondent's failure to respond to communications from the Union requesting bargaining, its failure to agree to meet with the Union, the agreement to meet with the Union and then the cancellation of such meetings[37] without further proposing any additional meetings, its failure to make any counterproposals to the Union's proposed contract,[38] all convince me that Respondent's

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[29] *Id.*

[30] *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887.

[31] Although the evidence shows that Respondent stated that it had not received the Union's demands by August 6, this was cured by the Union's sending another copy of its demands on August 8. Moreover, at a meeting on August 11, Respondent did not raise this issue.

[32] The Union thus made repeated offers to "negotiate" a renewal agreement with Respondent. Respondent's argument that the Union did not want to negotiate with it but rather demanded that it sign the agreement already negotiated by the Corrigan group is therefore without merit.

[33] Fleischer impressed me as a credible, forthright witness. I do not credit John Montesano's testimony that his father refused at that meeting to sign the contract because of the presence of an allegedly illegal hot cargo clause in the contract. The issue of the hot cargo clause did not arise until October 31 when the Union invoked it against Jet Sanitation and Respondent. Thus the clause could not have been an issue on October 13. Moreover, I note that Respondent signed without objection two prior contracts containing the identical clause. Furthermore, Jack Montesano's affidavit dealing with the October 13 conversation made no mention of his alleged refusal to sign the contract because of the subcontracting clause.

[34] Although Jack Montesano's affidavit as to that incident given on November 19 states that he refused to sign the contract because the Union took half his business from him, etc., he did not expressly state that the reason for his refusal to sign the contract was the presence of an allegedly illegal hot cargo clause in the contract. I do not credit John Montesano's testimony that his father refused to sign the contract because of the alleged hot cargo clause. John Montesano was present for only half the meeting and Fleischer denied that John was there for the critical conversation.

[35] I credit union attorney Weinmann's testimony that at no time prior to the instant hearing did Respondent raise the hot cargo clause issue as it related to the contract, and that Respondent never stated that it would refuse to sign the contract unless the clause was removed. Even if Respondent's attorney, Kaufman, told Weinmann, as he testified he did, on November 30, that Respondent would not sign the contract unless the offensive clause was removed, the following day, December 1, the Union executed a settlement agreement in which it agreed to do just that.

[36] It is noted, however, that subsequent to the opening of the instant hearing the parties met twice to negotiate a contract but failed to reach agreement.

[37] I note that one of these meetings was canceled due to the illness of Respondent counsel's wife. While I sympathize with the reason for the cancellation, nevertheless, "the fact that the Respondent's chosen bargaining representative may have had no time available to discharge the client's statutory duty is not a defense that is available to the Employer." *Imperial Tile Company*, 227 NLRB 1751, 1754 (1977), and cases cited therein.

[38] *B. F. Goodrich General Products Company, etc.*, 221 NLRB 288, 290 (1975).

entire course of action throughout the period after August 6, 1980, was lacking in a good-faith desire to arrive at a final agreement with the Union.[39] Moreover, by its actions, specifically in stating on November 17 that it would decertify the Union, in flatly stating on November 30 that it would not meet with the Union, and also in refusing to bargain pending the resolution of the decertification petition, Respondent has withdrawn its recognition of the Union.

I, therefore, find and conclude that, by refusing to meet and bargain with the Union from August 6, 1980, and by withdrawing recognition from the Union on November 17, Respondent has violated Section 8(a)(1) and (5) of the Act.

B. *The Alleged Failure To Make Fringe Benefit Payments*

The General Counsel alleges and Respondent admits that, on September 1, Respondent ceased making payments on behalf of its unit employees into the insurance, severance, and pension funds provided for in the contract which expired on August 31.

Respondent's argument is that inasmuch as the contract expired it was no longer under an obligation to make contributions to the funds. Moreover, Respondent also admitted, apparently in justification of its ceasing making payments to the Union's funds, that it created its own pension fund.[40]

> [T]he Board has held that health and welfare and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract. . . . Thus, an employer may not unilaterally alter payments into such plans unless: (1) the changes are made subsequent to the parties' reaching a bargaining impasse and the union has rejected the changes prior to the impasse, (2) the employer demonstrates that, at the time the changes were made, the union did not represent a majority of the unit employees or that the employer had a good-faith doubt, based on objective considerations, of the union's continuing majority status, or (3) the union has waived its right to bargain regarding the changes.[41]

It is clear that no impasse occurred. During the hearing, Respondent argued that an impasse had been reached as to the subcontracting clause because the Union insisted on its inclusion and Respondent wanted its exclusion. As set forth in detail above, I find and conclude that no impasse occurred as to the subcontracting clause or as to any issue. Moreover, not only was there no impasse—there was no bargaining. The parties had not met even once to negotiate a contract prior to the instant hearing.[42] As found above, the failure of the parties to meet and bargain was due to Respondent's avoidance of its bargaining obligation. Furthermore, as set forth above, there was no evidence that the Union did not represent a majority of the unit employees or that Respondent had a good-faith doubt, based on objective considerations, of the Union's continuing majority status. There was similarly no evidence that the Union had waived its right to bargain regarding the changes.

Accordingly, I find and conclude that by ceasing making payments on September 1, in behalf of its unit employees into the insurance, severance, and pension funds provided by the parties' contract, Respondent violated Section 8(a)(1) and (5) of the Act.[43]

CONCLUSIONS OF LAW

1. Respondent, Taurus Waste Disposal, Inc., is, and at all times material herein has been, an employer engaged in commerce within the meaning of the Act.

2. Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of the Act.

3. All full-time and regular part-time drivers and drivers' helpers employed by the Respondent at its Sayville, New York facility, exclusive of all other employees, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since in or about 1975, the Union has been the exclusive collective-bargaining representative of the enployees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, since August 6, 1980, to meet and bargain with the Union, by withdrawing recognition from the Union on November 17, 1980, as the representative

[39] *Anthony Carilli, d/b/a Antonino's Restaurant*, 246 NLRB 833, 841 (1979); *Imperial Tile Company, supra.*

[40] It was stipulated by the parties that Respondent created its own pension fund without prior consultation with the Union. Despite the fact that this admission and stipulation were made in the first day of hearing, even before any testimony was taken, counsel for the General Counsel did not move to amend her complaint until just prior to the last day of hearing after all parties had rested their cases just prior to the close of the hearing. Her motion was first made in the form of a motion to amend the complaint to conform the pleadings with the evidence. When questioned by me, she moved to amend the complaint to allege as a separate independent allegation of the complaint that Respondent unilaterally established its own pension fund in late 1980. Respondent's attorney objected to the motion to amend on the grounds that it was not timely made and that he would have to adduce evidence from representatives of the New York State Labor Department. I denied the motion to amend the complaint on the grounds that it was not timely made and the issue had not been fully litigated. Counsel for the General Counsel, in her brief, renewed her motion to amend the complaint. I reaffirm my denial of the motion to amend the complaint. The motion was not timely made, Respondent was not apprised that it would have to defend against this allegation, and the issue was not fully litigated. *Weather Tamer, Inc.*, 253 NLRB 293, 304 (1980); *Kern's Bakeries, Inc.*, 227 NLRB 1329, fn. 1 (1977). Moreover, the remedy for this allegation, if proven, would not add anything to the Order that it cease and desist from making unilateral changes inasmuch as such an Order would not require that Respondent discontinue the pension plan granted the employees. *Mountaineer Excavating Co., Inc.*, 241 NLRB 414, 417–418 (1979). For all of the above reasons, I reaffirm my ruling denying the General Counsel's motion to amend the complaint.

[41] *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 271, and cases cited therein.

[42] Union business agent Fleischer's visits to Respondent on October 13 and November 17 were not for the purpose of negotiating a contract. He was not authorized to negotiate contracts in behalf of the Union.

[43] *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

of the employees in the appropriate unit, and by unilaterally ceasing payments into the Union's insurance, severance, and pension funds upon the expiration of the 1977–80 collective-bargaining agreement between Respondent and the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall order Respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent make the employees whole by paying all insurance fund, severance fund, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and that it continue such payments until such time as Respondent negotiates in good faith with the Union to a new agreement or to an impasse.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[44]

The Respondent, Taurus Waste Disposal, Inc., Sayville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively with Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit described as follows:

> All full-time and regular part-time drivers and drivers' helpers employed by the Respondent at its Sayville, New York facility, exclusive of all other employees, and all supervisors as defined in Section 2(11) of the Act.

(b) Withdrawing recognition from the Union as the exclusive representative of the employees in the above-described appropriate unit.

(c) Unilaterally ceasing payments into the insurance fund, severance fund, and pension fund provided for in the collective-bargaining agreement between Respondent and the Union, which expired on August 31, 1980.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Bargain in good faith with Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit described as follows:

> All full-time and regular part-time drivers and drivers' helpers employed by the Respondent at its Sayville, New York facility, exclusive of all other employees, and all supervisors as defined in Section 2(11) of the Act.

(b) Make its employees whole by paying all insurance, severance, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until such time as Respondent negotiates in good faith to a new agreement or to an impasse.

(c) Post at its Sayville, New York, place of business copies of the attached notice marked "Appendix."[45] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[44] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[45] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT unilaterally cease making payments into the Union's insurance, severance, and pension funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make our employees whole by paying all insurance, severance, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent our unilateral discontinuance of such payments, and continue such payments until such time as we negotiate in good faith to a new agreement or to an impasse.

WE WILL bargain collectively in good faith with the Private Sanitation Union Local 813, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the following unit:

> All full-time and regular part-time drivers and drivers' helpers employed by us at our Sayville, New York facility, exclusive of all other employees, and all supervisors as defined in Section 2(11) of the Act.

TAURUS WASTE DISPOSAL, INC.